

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPHINE YURCABA,

Plaintiff,

v.

U.S. BANK NATIONAL
ASSOCIATION,

Defendant.

C21-5753 TSZ

ORDER

THIS MATTER comes before the Court on a motion, docket no. 13, to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6), 12(b)(7), and 19, or in the alternative to stay, filed by Defendant U.S. Bank National Association (“U.S. Bank”), and a motion to strike, docket no. 17, filed by Plaintiff Josephine Yurcaba. Having reviewed all papers filed in support of, and in opposition to, the motions, the Court enters the following Order.

Background

On October 8, 2021, Plaintiff, as personal representative of the estate of Mrs. Carolyn Black-Brooks, initiated this action to recover Individual Retirement Account (“IRA”) funds held by U.S. Bank. *See generally* Compl. (docket no. 24). Plaintiff alleges five causes of action against U.S. Bank: (i) breach of fiduciary duty; (ii)

1 violation of 26 U.S.C. § 408 of the Internal Revenue Code and its implementing
2 regulation, 26 C.F.R. § 1.408-2; (iii) violation of Washington’s Consumer Protection Act
3 (“CPA”); (iv) breach of the implied covenant of good faith and fair dealing; and (v)
4 conversion. *Id.* at ¶¶ 4.1–8.5.

5 On July 28, 2016, Mr. Kenneth Brooks designated his wife, Mrs. Black-Brooks, as
6 the primary beneficiary of his IRA held by U.S. Bank. *Id.* at ¶ 3.4. In 2016 and 2017,
7 Mr. Brooks also executed two wills, which bequeathed the majority of his estate to
8 Mrs. Black-Brooks and named her as the primary beneficiary of his estate. *Id.* at ¶ 3.2.
9 On May 26, 2019, Mr. Brooks passed away. *Id.* at ¶ 3.5. Mrs. Black-Brooks died on
10 October 10, 2019. *Id.* at ¶ 3.6. In 2019, U.S. Bank, acting in its capacity as trustee of the
11 Brooks Family Trust, filed a petition in state court seeking a determination that certain
12 assets, including the IRA, should not be paid to Mrs. Black-Brooks. Urness Decl. at ¶ 9
13 (docket no. 16). In 2021, U.S. Bank resigned as trustee of the Brooks Family Trust and
14 was replaced by John Hodder. *Id.* at ¶ 12. Hodder continues to litigate the state-court
15 action pending in the Kitsap County Superior Court. Heins Decl. at ¶ 5 (docket no. 15).

16 **Discussion**

17 **1. Motion to Strike**

18 Plaintiff moves, docket no. 17, to strike paragraphs seven and eight from the
19 Declaration of Jordan C. Urness, docket no. 16. Urness is a Wealth Management Trust
20 Advisor for U.S. Bank who served as an advisor for the Brooks Family Trust. Urness
21
22
23

Decl. at ¶ 1 (docket no. 16). Plaintiff contends that Urness's statements are inadmissible because he does not have personal knowledge. *See* Fed. R. Evid. 602.

Plaintiff's motion to strike is DENIED. U.S. Bank does not claim the statements are offered to prove the truth of the matter asserted. Def.'s Reply at 8 (docket no. 21). Rather, Urness's statements are offered to explain U.S. Bank's actions. *Id.*

2. Motion to Dismiss Pursuant to Rule 12(b)(6)

U.S. Bank moves under Rule 12(b)(6) to dismiss Plaintiff's second cause of action for failure to state a claim. A complaint may be lacking for one of two reasons:

(i) absence of a cognizable legal theory, or (ii) insufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

Plaintiff's second cause of action alleges that U.S. Bank violated 26 U.S.C. § 408 and 26 C.F.R. § 1.408-2 by wrongfully withholding the IRA funds from Mrs. Black-Brooks's estate. Compl. at ¶¶ 5.1–.5. The statute and regulation provide the general requirements for IRAs under the Internal Revenue Code. U.S. Bank contends that Plaintiff's second cause of action fails to plead a cognizable claim because 26 U.S.C. § 408 and 26 C.F.R. § 1.408-2 do not create a private right of action.

Although Plaintiff filed a response in opposition to U.S. Bank's motion to dismiss, docket no. 18, Plaintiff's response fails to address U.S. Bank's argument concerning a private right of action. Plaintiff's failure to respond to U.S. Bank's argument may be treated as an admission that the argument has merit. *See* LCR 7(b)(2); *see also* *Nieuwejaar v. Nationstar Mortg., LLC*, No. C15-1663, 2016 WL 1436123, at *4 n.8 (W.D. Wash. Apr. 12, 2016) ("The court construes Plaintiffs' silence regarding this

1 argument as an admission of its merit . . .”). Here, the Court treats Plaintiff’s silence as
2 an admission that U.S. Bank’s argument has merit and independently concludes that the
3 argument is meritorious.

4 “Like substantive federal law, private rights of action to enforce federal law must
5 be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Congress
6 may create a private right of action either expressly or implicitly. *Lil’ Man in the Boat,*
7 *Inc. v. City & County of San Francisco*, 5 F.4th 952, 958 (9th Cir. 2021). “If Congress
8 does not provide a private right of action explicitly within a statute’s text, [the Court]
9 must determine whether Congress implied one.” *Id.*

10 26 U.S.C. § 408 and 26 C.F.R. § 1.408-2 do not expressly provide a private right
11 of action, nor is a private right of action implied. “A number of courts have considered
12 and rejected the argument that an implied private cause of action exists under 26 U.S.C.
13 § 408.” *Mandelbaum v. Fiserv, Inc.*, 787 F. Supp. 2d 1226, 1237 (D. Colo. 2011); *see,*
14 *e.g., Scionti v. First Tr. Corp.*, Nos. H-95-5493, H-96-4506, H-97-2972, 1999 WL
15 35134588, at *17 (S.D. Tex. June 24, 1999) (“[T]here is no private cause of action for an
16 alleged breach of the tax code.”); *Sirna v. Prudential Sec., Inc.*, Nos. 95 CIV 8422, 95
17 CIV 9016, 96 CIV 4534, 1997 WL 53194, at *3 (S.D.N.Y. Feb. 10, 1997) (“[T]here is
18 nothing in the wording or effect of the statute to suggest that Congress intended to create,
19 via [§ 408], a private right of action against errant fiduciaries.”). The Court agrees with
20 these decisions and concludes that 26 U.S.C. § 408 and 26 C.F.R. § 1.408-2 do not create
21 a private cause of action as a matter of law.

Therefore, U.S. Bank's motion to dismiss Plaintiff's second cause of action is GRANTED.¹ Plaintiff's second cause of action is DISMISSED with prejudice, and without leave to amend, for failure to state a cognizable claim.²

3. Motion to Dismiss Pursuant to Rule 12(b)(7) or Alternative Request to Stay

U.S. Bank argues that Plaintiff's remaining claims must be dismissed under Rule 12(b)(7) for failure to join the Brooks Family Trust as a required party to this action. In the alternative, U.S. Bank requests that this action be stayed pending final resolution of the state case pursuant to the doctrine established in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and its progeny. The Court's jurisdiction is now based solely on diversity of citizenship.

In general, federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," even if an action concerning the same matter is pending in state court. *Colorado River*, 424 U.S. at 817; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983). The Supreme Court has explained that a district court has discretion to decline to exercise its jurisdiction due to a pending parallel action in state court under certain circumstances. *Colorado River*, 424 U.S. at 817. A

¹ Pursuant to Federal Rule of Evidence 201, U.S. Bank requests that the Court take judicial notice of certain documents filed in *In re Estate of Kenneth M. Brooks*, Case No. 20-2-01085-18, Kitsap County Superior Court. Exs. A–K to U.S. Bank's Request for Judicial Notice (docket no. 14). The Court has not considered the documents in ruling on U.S. Bank's motion to dismiss. U.S. Bank's Request for Judicial Notice, docket no. 14, is STRICKEN as moot.

² The Court concludes that granting Plaintiff leave to amend her second cause of action is futile. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). The claim pleaded in Plaintiff's second cause of action is not cognizable and cannot be cured by amending to allege additional facts.

1 dismissal or stay of the federal action or claim may be warranted based on considerations
 2 of “[w]ise judicial administration, giving regard to conservation of judicial resources and
 3 comprehensive disposition of litigation.” *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*,
 4 342 U.S. 180, 183 (1952). This doctrine allows federal courts to abstain from exercising
 5 jurisdiction where “exceptional circumstances” exist. *Colorado River*, 424 U.S. at 818.

6 The Ninth Circuit has recognized eight factors to consider when determining
 7 whether a *Colorado River* stay is appropriate:

8 (1) which court first assumed jurisdiction over any property at stake; (2) the
 9 inconvenience of the federal forum; (3) the desire to avoid piecemeal
 10 litigation; (4) the order in which the forums obtained jurisdiction; (5) whether
 11 federal law or state law provides the rule of decision on the
 12 merits; (6) whether the state court proceedings can adequately protect the
 13 rights of the federal litigants; (7) the desire to avoid forum shopping; and
 14 (8) whether the state court proceedings will resolve all issues before the
 15 federal court.

16 *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 978–79 (9th Cir. 2011). In this case, a
 17 majority of the relevant factors support a stay.

18 **a. Which Court First Assumed Jurisdiction Over the Property at Stake**

19 The first factor is of little weight. “[M]oney . . . is not the sort of tangible physical
 20 property referred to in *Colorado River*.” *Am. Int’l Underwriters (Philippines), Inc. v.*
 21 *Cont’l Ins. Co.*, 843 F.2d 1253, 1257–58. However, the Court recognizes that litigation
 22 in state court began over two years ago.

23 **b. Relative Convenience of the Forums**

U.S. Bank argues that Kitsap County Superior Court is a more convenient forum
 because some of the parties and witnesses live closer to the state courthouse than the

1 courthouses of this District. Plaintiff resides in Jefferson County, Washington, Compl. at
2 ¶ 1.1, as do many of the relevant witnesses, Heins Decl. at ¶ 7. Plaintiff did not address
3 this factor in her response to U.S. Bank's motion. The Court agrees with U.S. Bank that
4 this factor weighs in favor of a stay.

5 **c. The Desirability of Avoiding Piecemeal Litigation**

6 Continuing with this action will undoubtedly result in piecemeal litigation.
7 "Piecemeal litigation occurs when different tribunals consider the same issue, thereby
8 duplicating efforts and possibly reaching different results." *R.R. St. & Co.*, 656 F.3d at
9 979 (quoting *Am. Int'l Underwriters*, 843 F.2d at 1258). Although the claims in state
10 court differ from the claims before this Court, both courts have been tasked with
11 determining who is owed the IRA funds. Proceeding with this action will result in the
12 duplication of efforts and could lead to an inconsistent result. This factor weighs strongly
13 in favor of a stay.

14 **d. The Order in which the Forums Obtained Jurisdiction and the Desire**
15 **to Avoid Forum Shopping**

16 Plaintiff initiated this action in October 2021, two years after the state case
17 commenced. Notably, Plaintiff filed this federal action after the state court denied her
18 second motion to dismiss. The timing of this action strongly suggests that Plaintiff is
19 attempting to forum shop or avoid adverse rulings by the state court. *See Nakash v.*
20 *Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989) ("We have no interest in encouraging [the
21 practice of forum shopping]."). Plaintiff did not address this factor in her response. This
22 factor weighs heavily in favor of a stay.
23

1 **e. Whether State or Federal Law Controls and Whether the State**
2 **Proceeding is Adequate to Protect the Parties' Rights**

3 Plaintiffs' remaining claims are state law claims. Both this Court and the state
4 court are fully capable of deciding these claims. These factors are of little weight.

5 **f. Whether the State Court Proceedings will Resolve all Issues before the**
6 **Federal Court**

7 Finally, Plaintiff contends a stay is inappropriate because U.S. Bank is not a party
8 to the state case and the issues before the courts are different. Phrased differently,
9 Plaintiff argues that there is no parallel state proceeding because the parties in the state
10 and federal suits are not identical and because the claims raised in this suit are contractual
11 while those raised in the state action involve a dispute over the transfer of testamentary
12 and non-testamentary assets. The Court agrees that the federal and state actions are not
13 exactly parallel. However, "exact parallelism" is not required. *Nakash*, 882 F.2d at
14 1416. It is enough if the two actions are "substantially similar." *Id.*

15 The Court concludes that the two actions are substantially similar because they
16 both concern the validity of the IRA Beneficiary Designation Change Form and the
17 rightful beneficiary of the IRA. Both actions require a determination of Plaintiff's rights
18 in the IRA. The Court believes that litigation in state court will most likely resolve all
19 claims before this Court.

20 Having considered the relevant factors, the Court concludes that exceptional
21 circumstances warrant a stay in this action. Therefore, U.S. Bank's request to stay this
22 action is GRANTED.
23

1 **Conclusion**

2 For the foregoing reasons, the Court ORDERS:

3 (1) Plaintiff's Motion to Strike, docket no. 17, is DENIED, and U.S. Bank's
4 Request for Judicial Notice, docket no. 14, is STRICKEN as moot.

5 (2) U.S. Bank's Motion to Dismiss, docket no. 13, is GRANTED as to
6 Plaintiff's Second Cause of Action under 26 U.S.C. § 408 and 26 C.F.R. § 1.408-2.
7 Plaintiff's Second Cause of Action is DISMISSED with prejudice and without leave to
8 amend.

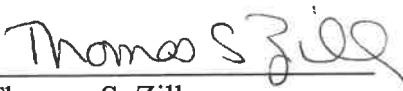
9 (3) U.S. Bank's request to stay pursuant to *Colorado River Water Conservation*
10 *District v. United States*, 424 U.S. 800, 817 (1976), and its progeny, is GRANTED. The
11 Court hereby STAYS all proceedings in this action pending final resolution of *In re*
12 *Estate of Kenneth M. Brooks*, Case No. 20-2-01085-18, or until further order of this
13 Court.

14 (4) The parties are DIRECTED to file a joint status report within fourteen (14)
15 days after final resolution of the state court litigation, or by December 31, 2022,
16 whichever occurs earlier.

17 (5) The Clerk is directed to send a copy of this Order to all counsel of record.

18 IT IS SO ORDERED.

19 Dated this 17th day of March, 2022.

20 
21 Thomas S. Zilly
22 United States District Judge
23